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No. 03-409

IN THE
SUPREME COURT OF THE UNITED STATES

KP PERMANENT MAKE-UP, INC,
Petitioner,

v.

LASTING IMPRESSION INC, et al.
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Amicus Brief of Malla Pollack and Other Law Professors Supporting KP Permanent Make-Up, Inc.

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Interest of the *Amici Curiae*

Amici curiae are law professors specializing in trademark, copyright, and related subjects. None of *amici* have any financial interest in the outcome of this litigation.[1] *Amici* provide their institutional affiliations for identification purposes only; they do not purport to represent the opinions or interests of their respective institutions. *Amici*'s sole interest in this case is to encourage the proper unfolding of law in their areas of specialty.

Authority to File

Both parties have given permission for Pollack to file this *amicus* submission. Copies of the permission letters are attached to the proof of service submitted to the Clerk.

Summary of Argument

The plain text of the relevant statute requires reversal in this case. The Ninth Circuit has misappropriated Congress' authority by adding an element to a statutory defense, thus narrowing the fair use defense mandated by Congress. Likelihood of confusion is an element of the plaintiff's case. Fair use is not a *defense* if it exists only when plaintiff's proof fails.

Judicial deference to Congress is especially

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1. No party has authored this brief in whole or in part. The printing of this *amicus* filing was paid for by Malla Pollack with the generous support of the University of Oregon, School of Law.

appropriate in this instance where the judicial invention disserves both competition and basic free speech theory. Furthermore, the Ninth Circuit's variation increases the potential for unconstitutional applications of the statute. Therefore, in this case, the rule that a statute should be construed according to its plain meaning is supported by two other strong cannons of statutory construction. First, the rule that statutes should be read to prevent raising doubts of their constitutionality. Second, the rule that, unless Congress has spoken with extreme clarity, statutes should not be read to approach the limits of Congress' power.

This Court should, therefore, reverse and remand with instructions for the Ninth Circuit to adhere to the statute's enacted language.

Argument

I. The Ninth Circuit Has Over-reached into Legislation

The plain language of the Lanham Act provides a defense against alleged infringement of even an incontestibly registered mark whenever "the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party ..." 15 U.S.C. § 1115 (b)(4). The Ninth Circuit's doctrine burdens fair users by handicapping them with the burden of disproving likelihood of confusion,[2] a

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2. This burden is aggravated by other non-statutory burdens enforced by the Ninth Circuit. For example, in this

burden not imposed by the language Congress enacted. The Ninth Circuit's position prevents fair use from functioning as a defense, and, thereby, renders 15 U.S.C. § 1115(b)(4) mere surplusage.

Section 1115(b) is entitled "[i]ncontestibility defenses." The first paragraph of 1115(b) ends: "Such conclusive evidence of the right to use the [incontestibly] registered mark shall be subject to proof of infringement as defined in section 1114 of this title, and shall be subject to the following defenses or defects . . ." "[P]roof of infringement as defined in section 1114" requires proof that defendant's use is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a); 15 U.S.C. § 1114(1)(b). The elements of plaintiff's cause of action are (a) holding a relevant incontestible registration, and (b) likelihood of confusion. Likelihood of confusion is a precondition to considering the fair use defense, not a subpart of the defense.

The word "defects" does not undermine this analysis. The listed defects concern problems with plaintiff's use or acquisition of the mark: fraud, abandonment, misrepresentation, antitrust violation, and functionality. 15 U.S.C. § 1115(b)(1), (2), (3), (7), (8). The "defenses" are

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case, the Ninth Circuit has extended the statutory conclusive presumption of secondary meaning triggered by an incontestible registration from "the registered mark," 15 U.S.C. § 1115(b) (containing numerous repetitions of "the registered mark"), to "the most salient feature of the mark," the "term 'micro colors' apart from the mark." *KP Permanent Make-Up, Inc. v. Lasting Impressions, Inc.*, 328 F.3d 1061, 1071 (9th 2003), *cert. granted*, 124 S. Ct. 981 (U.S. Jan. 9, 2004) (this case).

actions by defendant: fair use and prior use. 15 U.S.C. § 1115(b)(4), (5), (6). All of the items listed in § 1115(b) ("defenses," "defects," and "equitable principles") concern matters outside the elements of plaintiff's *prima facie* case (an incontestible registration and likelihood of confusion).

In short, likelihood of confusion is an element of the plaintiff's case. Fair use is not a *defense* if it exists only when plaintiff's proof fails.[3]

Furthermore, the Ninth Circuit's position renders subsection § 1115(b)(4) mere surplusage. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotation marks and supporting citations omitted); *see also id.* at 29 (refusing a proffered statutory construction because "[i]t would in practical effect render [one] exception entirely superfluous in all but the most unusual circumstances."). If fair use only exists when plaintiff has failed to prove likelihood of confusion, fair use itself does no work.

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3. McCarthy, recognizing disagreement, takes the position that the common law fair use defense is merely a short-hand term for one set of cases where plaintiff has failed to prove likelihood of confusion. *See* McCarthy on Trademarks and Unfair Competition § 11:47 (3d ed.). However, this Court "read[s] Congress' codification of one judge-made doctrine not as a license to imply others, but rather as an intentional rejection of those it did not codify." TRW Inc. v. Andrews, 534 U.S. 19, 31 at n.5 (2001).

The Ninth Circuit's amendment of the Lanham Act ignores constitutionally required judicial "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." Lamie v. United States Trustee, U.S. No. 02-693, slip. op. at 11 (Jan. 26, 2004) (citations omitted). Furthermore, the Ninth Circuit's violation of the plain meaning rule of statutory construction takes a most disfavored form, "read[ing] absent word[s] into the statute." *Id.*

The Ninth Circuit's amendment lacks the excuse of apparent legislative drafting error[4] or any hint that the language of the statute leads to harsh, let alone absurd, results. *See Lamie*, slip op. at 6, 11 (insisting that plain meaning may be disregarded by courts only when plain meaning results are "absurd," not merely to prevent an "harsh outcome.").

Furthermore, the Ninth Circuit's reading is in clear tension with basic assumptions of American jurisprudence. Even more disturbing, the Ninth Circuit's amended statute greatly increases the likelihood of unconstitutional applications of the statute. The Ninth Circuit, therefore, has amended a federal statute precisely in those circumstances where judicial caution is most appropriate. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (citations omitted) (cautioning against reading statutes to promote constitutional problems absent the clearest statutory language); Vermont

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4. As this Court has recently emphasized, even congressional drafting errors do not empower courts to insert additional words into enacted statutes. *See Lamie v. United States Trustee*, U.S. No. 02-693, slip op. at 15 (Jan. 26, 2004).

Agency v. United States *ex rel* Stevens, 529 U.S. 765, 787 (2000) (same); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (same); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (same).

Amici leave fuller explication of the statute's plain meaning to Petitioner, but write separately to clarify the default positions and constitutional warning signs counseling against the Ninth Circuit's amendment to the Lanham Act.

II. Competition is the American Default Position

The Ninth Circuit changed Congress' careful decision about how far to allow incontestible trademark registrations to limit *competition* by limiting competitors' ability to describe their goods to potential customers.

The basic rule of United States business law is free competition. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) ("The basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels.") Competition should be helped, not hindered, by mark regulation. *See* Qualitex Co. v. Jacobson Prods., 514 U.S. 159, 164 (1995) ("trademark law . . . seeks to promote competition"); Park N' Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 193 (1985) ("trademarks desirably promote competition"); *see also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("The Patent [and Copyright] Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition ....").

The United States thrives because of competition. "Of all human powers operating on the affairs of mankind, none is

greater than that of competition." 8 Henry Clay, *On the American System, in* The Works of Henry Clay 437, 469 (ed. Calvin Colton, 1904) (transcribing a speech made in the Senate, Feb. 2, 3, & 6, 1832). Allowing one firm to muzzle a competitor allows that firm to silence consumer choice. "Each entrepreneur represents a different aspect of the consumers' wants. . . . The competition among the entrepreneurs is ultimately a competition among the various possibilities open to men . . ..", thus empowering consumers. Ludwig von Meises, Human Action: A Treatise on Economics, at Part 4, Chapter 16, ¶ 32 (4th revised ed. 1996), *available at* <http://www.econolib.org/ library/Mises/ HmA/msHmA16.html> .

> The interest of the dealers . . . in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they naturally would be, to levy, for their own benefit, an absurd tax upon the rest of their fellow-citizens. . . . . [Dealers are] an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.

Adam Smith, An Inquiry into the Nature and Causes of the

Wealth of Nations, at Book I, Ch. 11, ¶ 11, *available at*, <http://www.econolib.org/library/>.

Competition is the bedrock of trade. Courts should not block free competition absent legislative action. *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 212 (2000) (refusing to accept a forced reading of the Lanham Act because "[c]onsumers should not be deprived of the benefits of competition . . . by a rule of law that facilitates plausible threats of suit..."). Congress, not the courts, guards the delicate balance that renders trademark, and other intellectual property holdings, pro-competitive. *See* Eldred v. Ashcroft, 537 U.S. 186, 205 n.10 (2003) ("[W]e have stressed that 'it is not our role to alter the delicate balance Congress has labored to achieve.'") (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).

Therefore, the Ninth Circuit should be ordered to follow the language of the Lanham Act.

III. Free Speech is the American Default Position

The Ninth Circuit changed Congress' careful decision about how far to allow incontestible trademark registrations to limit competition by limiting competitors' ability to *describe* their goods to potential customers.

"[W]ords because they are the common property of the human race, . . . are as little susceptible of private appropriation as air or sunlight...." Homes v. Hurst, 174 U.S. 82, 86 (1899) (internal quotations & citation omitted). Any one "is at liberty under the law to manufacture and market an exactly similar preparation [as respondent's non-patented formula] and to notify the public that it is being done" by using the same descriptive terms used by respondent. William

v. Warner & Co. v. Eli Lilly & Co., 265 U.S. 526, 529 (1924) (referring to terms "Quin-Coco" and "Coco-Quinine); *see also* Saxlehner v. Wagner, 216 U.S. 375, 379 (1910) (upholding right to use "artificial Hunyadi Janos" on bottled water).

The Lanham Act's incontestibility provisions changed this rule somewhat. *See* Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 199-202 (1985) (holding that Lanham Act prevents use of "mere descriptiveness" defense against mark with incontestible registration).

Allowing sole private ownership of a word, however, raises First Amendment issues. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 532 (1987) ("This Court has recognized that words are not always fungible, and that the suppression of particular words runs a substantial risk of suppressing ideas in the process.") (internal editing, quotation marks, and citation omitted). *See also, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (recognizing First Amendment issues raised by government regulation of truthful advertising); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (same); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (same).

The Court did not closely consider First Amendment problems in *Park N' Fly*, recognizing that the judiciary should defer to Congress' clear decision. *See Park N' Fly*, 469 U.S. at 202 ("At bottom, the dissent simply disagrees with the balance struck by Congress in determining the protection to be given incontestible marks."). The *Park N' Fly* Court also noted that Congress had limited incontestible rights, *inter alia,* by "under certain circumstances, permit[ing] the nontrademark use of descriptive terms contained in an incontestible mark." *Id.* at 201 (referring to statute now at issue).

However, the First Amendment tension strongly counsels not investing incontestible registrations with one iota more power over language than Congress clearly required. Therefore, the Ninth Circuit should be ordered to follow the language of the Lanham Act.

IV. The Ninth Circuit's Rule Multiples the Risk of Unconstitutional Applications of the Lanham Act

Besides the First Amendment issues created by incontestible registrations of merely descriptive words, the Ninth Circuit's doctrine greatly raises the risk of collisions between the Lanham Act and the Copyright and Patent Clause. U.S. Const., Art. I, sec. 8, cl. 8 ("Congress shall have the power . . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). This Clause prohibits Congress from creating a species of temporally unlimited copyrights. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041, 2050 (2003); *Eldred*, 537 U.S. at 199.

Trademarks are not required to be copyrightable or patentable subject matter. The Trademark Cases, 100 U.S. (18 Otto) 82, 94 (1879) (holding that statute protecting use-based trademarks is outside Congress' Copyright and Patent power because such marks are neither "writings" nor "discoveries."). However, many current trademarks are copyrightable subject matter, having the requisite "minimal level of creativity." Feist Publ'ns v. Rural Tel. Svc., 499 U.S. 340, 359 (1991). Respondent's incontestibly registered design and word mark is copyrightable.

Unlike copyrights, trademarks may last forever.

Trademark protection of copyrightable works whose copyright protection has expired has been allowed by some courts on the ground that trademark protects consumers from confusion.[5] However, "confusion" can only exist if consumers recognize the claimed *res* as an indicia of origin;[6] for merely descriptive marks, such recognition requires secondary meaning.[7] But, if

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5. *See* McCarthy on Trademarks and Unfair Competition § 6.10 (3rd ed.) (providing overview of cases); *see id.* at 6-52 (focusing on confusion requirement); *see also* Hugh Latimer & Karyn K. Ablin, *Stealth Patents: The Unconstitutionality of Protecting Product Designs under the Federal Trademark Dilution Act*, 90 Trademark Rep. 489, 490 (2000) ("[T]he key distinction that allows trademarks peacefully to coexist with patents and copyrights is that trademarks . . . require[] a demonstration of consumer confusion . . . .").

6. *See Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 210 (2000) ("without distinctiveness [a mark] would not cause confusion . . . as the [statute] requires.") (internal quotation marks & citation omitted). *See also Qualitex Co. v. Jacobson Prods.*, 514 U.S. 159, 164 (1995) ("It is the source-distinguishing ability of a mark . . . that permits it to serve [a mark's] basic purposes.").

7. *See Wal-Mart*, 529 U.S. at 211 n.* (defining "secondary meaning" as "acquired meaning."); *see also* Rest. (3d) Unfair Comp. § 13 (b) (explaining that secondary meaning exists when "the designation, although not 'inherently distinctive,' has become distinctive, in that, as a result of its use, prospective purchasers have come to

a business is sued for allegedly infringing an incontestibly registered mark, the incontestible mark is conclusively presumed to have secondary meaning, even if the mark is descriptive. The plaintiff does not submit evidence of secondary meaning. The defendant is legislatively barred from proving lack of secondary meaning. *See Park N' Fly*, 469 U.S. at 205 ("We conclude that the holder of a registered mark may rely on incontestibility to enjoin infringement and that such an action may not be defended on the grounds that the mark is merely descriptive.").

This confluence of rules means that the universe of copyrightable, but merely descriptive, incontestibly registered marks may be enforced perpetually even if no secondary meaning exists, thus creating unconstitutional perpetual copyrights. Furthermore, as the constitutionally based "non-obviousness" standard for patent protection prohibits patent-like protection of obvious quasi-inventions,[8] the "originality" requirement of the copyright subsection of clause 8, may render unconstitutional copyright-like protection of sub-copyrightable material (such as single words and short phrases). *See Feist*, 499 U.S. at 359 (holding that originality

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perceive it as a designation that identifies goods, services, businesses, ...").

8. *See Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (holding that constitution bars patent protection of obvious quasi-inventions); *see also Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 156 (1989) (striking down state provision of patent-like unfair competition protection for subpatentable quasi-invention).

is a constitutional requirement for copyright protection); *Trademark Cases*, 100 U.S. at 94 (holding that single words and short phrases commonly used as trademarks are not sufficiently original for copyright protection). "Trademark" protection of descriptive word marks lacking secondary meaning would be unconstitutional copyright-like protection.

Any judicial expansion of the power of incontestible registrations increases the likelihood of such unconstitutional applications of the Lanham Act. The Ninth Circuit's rule, requiring the proponent of the fair use defense to bear the non-statutory burden of proving lack of likelihood of confusion, is such a problematical change.[9] As with other statutory language approaching the limits of Congress' power, incontestible trademark registrations should not be judicially extended beyond unmistakable statutory command. *See e.g., St. Cyr*, 533 U.S. at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress'-power, we expect a clear indication that Congress intended that result"; invoking "plain statement rule.").

This is not a case where Congress wrote an

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9. As noted *supra* note 2, this problem is exacerbated by another non-statutory doctrine enforced by the Ninth Circuit. The Ninth Circuit has extended the statutory conclusive presumption of secondary meaning triggered by an incontestible registration from "the registered mark," 15 U.S.C. § 1115(b) (containing numerous repetitions of "the registered mark"), to "the most salient feature of the mark," the "term 'micro colors' apart from the mark." *KP Permanent Make-Up, Inc. v. Lasting Impressions, Inc.*, 328 F.3d 1061, 1071 (9th 2003).

unconsitutional statute. This is another example of a few federal courts expanding the language of a federal statute without recognizing their approach towards a constitutional precipice. *See Dastar,* 123 S. Ct. at 2050 (rejecting Ninth Circuit's reading of 15 U.S.C. § 1125(a)(1)(A), Lanham Act § 43(a), because "[t]o hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright which Congress may not do.").

Therefore, the Ninth Circuit should be ordered to follow the language of the Lanham Act.

Conclusion

For all the reasons discussed above, this Court should reverse and remand, instructing the Ninth Circuit to follow the language of the Lanham Act.

Respectfully submitted, March 25, 2004

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